

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**PHOEBE ECHOLS MCGUIRE,  
Grievant,**

**v.**

**Docket No. 2011-1154-MnrED**

**MONROE COUNTY BOARD  
OF EDUCATION,  
Respondent.**

**DECISION**

Grievant, Phoebe Echols McGuire, filed a grievance against Respondent on February 9, 2011. The statement of grievance reads,

On January 28, 2011, I was notified by letter of the superintendent of Monroe County Schools dated January 27, 2011, of the decision of the Monroe County Board of Education on January 25, 2011[,] to terminate my employment contract at the end of the 2010-2011 school year. This action violates WV Code 6C-1 et seq., whistle-blower law and WV Code 18A-4-7a.

For relief, Grievant seeks to be “retained in my current employment or in a position held by a less senior employee.” By letter dated March 2, 2011, Grievant elected to proceed directly to a level three hearing as authorized by W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on May 6, 2011, before Administrative Law Judge Carrie LeFevre in Beckley, West Virginia.<sup>1</sup> Appearing for Grievant were R.M. James, Jr., representative, and Kathy H. Martin and Ben Barkey, West Virginia Education Association.

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<sup>1</sup>For administrative purposes, the case was reassigned to the undersigned on October 7, 2011.

Respondent was represented by Gregory W. Bailey, Esq., Bowles Rice McDavid Graff & Love LLP. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on June 7, 2011.<sup>2</sup>

### **Synopsis**

Grievant asserts that Respondent's termination of her employment contract pursuant to a reduction-in-force (RIF) was contrary to RIF provisions in WEST VIRGINIA CODE § 18A-4-7a. Specifically, Grievant contends that Respondent was required to allow her to laterally "bump" a less senior employee in a professional position that only required a teaching certificate. Grievant contends that the curriculum of parenting education is required to be taught in West Virginia public schools, therefore her position of Family and Consumer Science teacher should not have been terminated. Also, Grievant argues that Respondent's decision to terminate her employment contract was in retaliation for her having engaged in protected activities. Respondent asserts a RIF was undertaken due to budget deficits and that the decision to terminate Grievant's employment contract was not motivated by reprisal. Respondent argues that it did not rescind its decision to eliminate the SAT Specialist position until after Grievant filed this grievance and that Grievant did not prove that she met the qualifications for the position.

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<sup>2</sup>Respondent filed a Motion to Dismiss, received by this Board on July 5, 2011. Respondent asserts that because Grievant has accepted employment with Greenbrier County Schools for the 2011-2012 school year, the grievance is moot. Respondent asserts that Grievant has lost her standing to pursue a grievance against it because she is no longer an employee. Grievant filed a Response to the Motion to Dismiss, received by this Board on July 18, 2011. Grievant asserts that she did not voluntarily end her employment with Respondent. Grievant asserts that seeking some form of income while pursuing this grievance does not render the grievance moot. The undersigned is in agreement with Grievant's position that this matter is not moot. The Motion to Dismiss is denied.

Grievant met her burden of proof and established that Respondent violated WEST VIRGINIA CODE § 18A-4-7a when it did not place her into the restored professional position of SAT Specialist. Grievant failed to establish that Respondent's decision to eliminate her position of Family and Consumer Science teacher was retaliation and that the policy required parenting education curriculum is not being taught at JMHS. Accordingly, this grievance is GRANTED, in part, and DENIED, in part.

### **Findings of Fact**

1. At the time of filing this grievance, Grievant was employed as a vocational educator for Respondent. Grievant taught Family and Consumer Science at James Monroe High School (JMHS).

2. Grievant taught parenting education, a curriculum that is required to be taught in West Virginia public schools by West Virginia Department of Education Policy 2530.02.

3. Grievant has twelve years seniority in Monroe County.<sup>3</sup>

4. Sherry Baker, SAT Specialist, has ten years seniority in Monroe County.<sup>4</sup>

5. On May 7, 2010, Grievant emailed Donna Wilkes with the West Virginia State Board of Education to express concern that Carl Perkins funding was being improperly used at JMHS.<sup>5</sup>

6. In October 2010, Grievant filed a grievance asserting that the Director of Monroe County Technical Center was not ensuring that vocational teachers were

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<sup>3</sup>See Grievant's Exhibit No. 6, Professional Seniority List.

<sup>4</sup>*Id.*

<sup>5</sup>See Grievant's Exhibit No. 9, Email dated May 7, 2010, and level three testimony of Grievant.

performing their assigned bus duty.

7. On October 19, 2010, Grievant emailed Kevin Siers, Superintendent for Monroe County Schools, to request that he look into the Carl Perkins funding for vocational teachers at JMHS.<sup>6</sup>

8. At a public meeting on March 11, 2010, Grievant expressed her opinion in a presentation that a trimester schedule at JMHS would be disadvantageous to students.

9. Respondent has experienced budget deficits. As a result, a reduction-in-force (RIF) was undertaken in an effort to reduce the number of positions above the amount funded under the State Aid Funding formula.<sup>7</sup> Any positions over the number funded under the formula are paid for by the county's board of education.

10. Superintendent Siers requested that each principal, including then principal at JMHS, Paul Lovett, identify positions to be considered for elimination. The teaching position held by Grievant was among the positions Principal Lovett identified to be considered for elimination. Prior to Superintendent Siers' recommendation to the county board of education of which positions to eliminate, Principal Lovett resigned from his employment with Respondent.

11. After receiving Principal Lovett's recommendations for positions to eliminate, Superintendent Siers conducted his own review of the facts and circumstances surrounding the proposed eliminations as well as consulted with Lisa Mustain, now

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<sup>6</sup>See Grievant's Exhibit No. 10, Email dated October 19, 2010, and level three testimony of Grievant.

<sup>7</sup>Testimony of Kevin Siers, Superintendent for Monroe County Schools.

principal at JMHS.<sup>8</sup>

12. Grievant was notified by letter<sup>9</sup> dated December 22, 2010, of Superintendent Siers' intent to recommend that the position being taught by Grievant be terminated at the close of the 2010-2011 school year. The letter provided the following reason for the recommended termination: "Declining enrollment has led to a loss of funding for Monroe County Schools which has necessitated the elimination of positions such as yours." In compliance with W.VA. CODE § 18A-2-2, Grievant was extended the opportunity for a hearing with Respondent regarding the recommendation. Grievant's hearing was held on January 22, 2011.<sup>10</sup>

13. Superintendent Siers presented personnel recommendations, including the elimination of the teaching position held by Grievant, to Respondent at a special meeting held on January 25, 2011.<sup>11</sup> The position of SAT Specialist was also included on the list of recommended professional terminations. The entire list of 30 recommended professional terminations was approved by unanimous vote.

14. Also at the January 25, 2011, special meeting, Superintendent Siers presented eight professional transfer recommendations, including Ms. Baker. All eight

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<sup>8</sup>*Id.*

<sup>9</sup>Grievant's Exhibit No. 3.

<sup>10</sup>Due to a recording device's mechanical malfunction, a transcript could not be produced from Grievant's termination hearing on January 22, 2011. See Grievant's Exhibit No. 6, Letter to Grievant from Superintendent Siers dated February 14, 2011.

<sup>11</sup>See Grievant's Exhibit No. 14, Monroe County Board of Education Special Meeting minutes.

transfer recommendations were approved by unanimous vote.<sup>12</sup>

15. The decision to terminate the SAT Specialist position was later rescinded by Respondent. Ms. Baker was retained in the SAT Specialist position.

16. The position of SAT Specialist is a professional position that has no specific subject area license or certification requirement. Applicants simply must have a teaching certificate.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant asserts that Respondent's termination of her employment contract pursuant to a reduction-in-force (RIF) was contrary to RIF provisions in WEST VIRGINIA CODE § 18A-4-7a. Specifically, Grievant contends that Respondent was required to allow her to laterally "bump" a less senior employee in a professional position that only required a teaching certificate. Grievant contends that the curriculum of parenting education is required to be taught in West Virginia public schools, therefore her position of Family and Consumer Science teacher should not have been terminated. Also, Grievant argues that

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<sup>12</sup>*Id.*

Respondent's decision to terminate her employment contract was in retaliation for her having engaged in protected activities. Respondent asserts a RIF was undertaken due to budget deficits and that the decision to terminate Grievant's employment contract was not motivated by reprisal. Respondent argues that it did not rescind its decision to eliminate the SAT Specialist position until after Grievant filed this grievance and that Grievant did not prove that she met the qualifications for the position.

WEST VIRGINIA CODE § 18A-4-7a provides, in pertinent part:

(f) ~~[[The seniority of an employee shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education and shall be granted in all areas that the employee is certified, licensed or both.~~

...

- (j) Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least seniority shall be properly notified and released from employment pursuant to the provisions of....[18A-2-2] of this chapter...
- (2) An employee subject to release shall be employed in any other professional position where the employee is certified and was previously employed or to any lateral area for which the employee is certified, licensed or both, if the employee's seniority is greater than the seniority of any other employee in that area of certification, licensure or both;
- (3) If an employee subject to release holds certification, licensure or both in more than one lateral area and if the employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification, licensure or both, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification, licensure or both; and
- (4) If, prior to the first day of August of the year a reduction in force is approved, the reason for any particular reduction in force no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the released employee in writing of his or her right to

be restored to his or her position of employment... if there is another employee on the preferred recall list with proper certification and higher seniority, that person shall be placed in the position restored as a result of the reduction in force being rescinded.

Grievant asserts that as a RIF'd employee she should have bumped a less senior professional employee for the position of SAT Specialist.<sup>13</sup> The professional position of SAT Specialist requires a teaching certificate. No specific area of licensure or certification is required. Grievant possesses a teaching certificate and has greater seniority in the county than the employee currently holding the SAT Specialist position. In *Angus v. Cabell County Board of Education*, Civil Action No. 01-AA-9 (August 2, 2002), the Kanawha County Circuit Court reversed a Grievance Board decision and held that a teacher with greater seniority has the right to bump another teacher for a professional position when there is no special area of certification required. The Court found this result "is consistent with the provisions of West Virginia Code section 18A-4-7a and the underlying purposes of seniority. Further, it is consistent with the policy of placing the best qualified, most experienced teachers in our classrooms." *Id.*

Respondent argues that it did not decide to rescind the termination of the SAT Specialist position until after Grievant filed this grievance, therefore Grievant may not seek to be placed into that position as relief. If after a RIF action is approved, the RIF is no

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<sup>13</sup>Under WEST VIRGINIA CODE § 18A-4-7a(j)(2), the position in question must have been previously held by the RIF'd employee or be a lateral position. Grievant has not previously held the position of SAT Specialist. Grievant's Exhibit No. 15, the vacancy posting for SAT Specialist from June 18, 2008, states in parenthesis under the position title that it is "not a teaching position." The undersigned finds upon review of the definitions for professional personnel contained within WEST VIRGINIA CODE § 18A-1-1, that because the position requires a teaching certification and does not involve supervisory or management responsibilities, the SAT Specialist position is a lateral position to that of classroom teacher.



longer required for a position, the board of education may rescind the RIF and fill that position according to proper statutory provisions. See *Harshbarger v. Lincoln County Board of Education*, Docket No. 96-22-528 (Dec. 31, 1997). WEST VIRGINIA CODE § 18A-4-7a(j)(4) states that “the board shall rescind the reduction in force or transfer and shall notify the released employee in writing of his or her right to be restored to his or her position of employment... if there is another employee on the preferred recall list with proper certification and higher seniority, that person shall be placed in the position restored as a result of the reduction in force being rescinded.” Upon rescinding the RIF of the SAT Specialist position, Respondent should have placed Grievant into the restored position because she holds the required teaching certification and has greater seniority than Ms. Baker.

Respondent argues that Grievant did not offer any evidence that she meets the qualifications of the SAT Specialist position. WEST VIRGINIA CODE § 18A-4-7a allows a RIF’d professional employee, such as Grievant, to bump another professional employee with less seniority in any of the RIF’d employee’s areas of licensures, certificates, or both. Grievant holds the required teaching certificate for the SAT Specialist position. Grievant has proven that Respondent violated WEST VIRGINIA CODE § 18A-4-7a and that she should be placed into the restored position of SAT Specialist.

Grievant argues that because parenting education is a curriculum that is required to be taught in West Virginia public school by West Virginia Department of Education Policy 2530.02, her position as Family and Consumer Science teacher should not have been terminated. Grievant did not demonstrate that Respondent was not assigning the required parenting education curriculum to another teaching position. Simply because

Grievant is no longer employed as a Family and Consumer Science teacher at JMHS, does not necessarily mean that the parenting education curriculum is not being taught at the school. Grievant has failed to prove that Respondent committed any violation by terminating the position of Family and Consumer Science teacher.

Grievant argues that Respondent's decision to terminate her position was based on reprisal for her participating in protected activities. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

- (1) That he engaged in protected activity (i.e., filing a grievance);
- (2) That he was subsequently treated in an adverse manner by the employer or an agent;
- (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

*Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant asserts that the previous Principal at JMHS, Paul Lovett, included her position on the list of recommended positions to eliminate, as retaliation for Grievant filing

a grievance asserting that other vocational teachers were not participating in bus duty, speaking at a public meeting against a trimester schedule change, and expressing concerns that Carl Perkins funding was not being appropriately spent. Grievant attributes differences she had with Mr. Lovett as the reason he identified her position for elimination. Prior to the Superintendent's recommendation to Respondent that Grievant's position be eliminated, Mr. Lovett resigned from his employment with Respondent. Superintendent Siers conducted his own review of the facts and circumstances surrounding the proposed elimination of Grievant's position. Superintendent Siers, not Mr. Lovett, recommended to Respondent that 30 professional positions, including Grievant's, be terminated. Respondent unanimously voted to terminate all 30 positions. Grievant did not assert that Superintendent Siers or the members of the board of education held improper motives for the elimination of her position. Grievant has failed to establish by a preponderance of the evidence that there was a causal connection between her protected activity and the elimination of her position.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. In *Angus v. Cabell County Board of Education*, Civil Action No. 01-AA-9 (August 2, 2002), the Kanawha County Circuit Court reversed a Grievance Board decision and held that a teacher with greater seniority has the right to bump another teacher for a professional position when there is no special area of certification required. The Court found this result “is consistent with the provisions of West Virginia Code section 18A-4-7a and the underlying purposes of seniority. Further, it is consistent with the policy of placing the best qualified, most experienced teachers in our classrooms.” *Id.*

3. If after a RIF action is approved, the RIF is no longer required for a position, the board of education may rescind the RIF and fill that position according to proper statutory provisions. See *Harshbarger v. Lincoln County Board of Education*, Docket No. 96-22-528 (Dec. 31, 1997).

4. Grievant holds the required teaching certificate for the SAT Specialist position. Grievant has greater seniority in the county than Ms. Baker. Grievant proved that Respondent violated WEST VIRGINIA CODE § 18A-4-7a and that she should be placed into the restored position of SAT Specialist.

5. Grievant failed to prove that Respondent committed any violation by terminating the position of Family and Consumer Science teacher.

6. To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

- (1) That he engaged in protected activity (i.e., filing a grievance);
- (2) That he was subsequently treated in an adverse manner by the employer or an agent;
- (3) That the employer’s official or agent had actual or constructive knowledge

that the employee engaged in the protected activity; and

(4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

*Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. Grievant failed to establish by a preponderance of the evidence that there was a causal connection between her protected activity and the elimination of her position.

Accordingly, this grievance is GRANTED, in part, and DENIED, in part. Respondent is directed to place Grievant in the lateral professional position of SAT Specialist, with any applicable backpay and benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any

such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: November 7, 2011**

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**Jennifer Lea Stollings-Parr  
Administrative Law Judge**